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Supreme Court of the United States

OCTOBER TERM, 1932

No. 38

SUN OIL COMPANY,

Petitioner,

against

DALZELL TOWING COMPANY, INC.,

Respondent.

BRIEF ON BEHALF OF PETITIONER ON WRIT OF CERTIORARI

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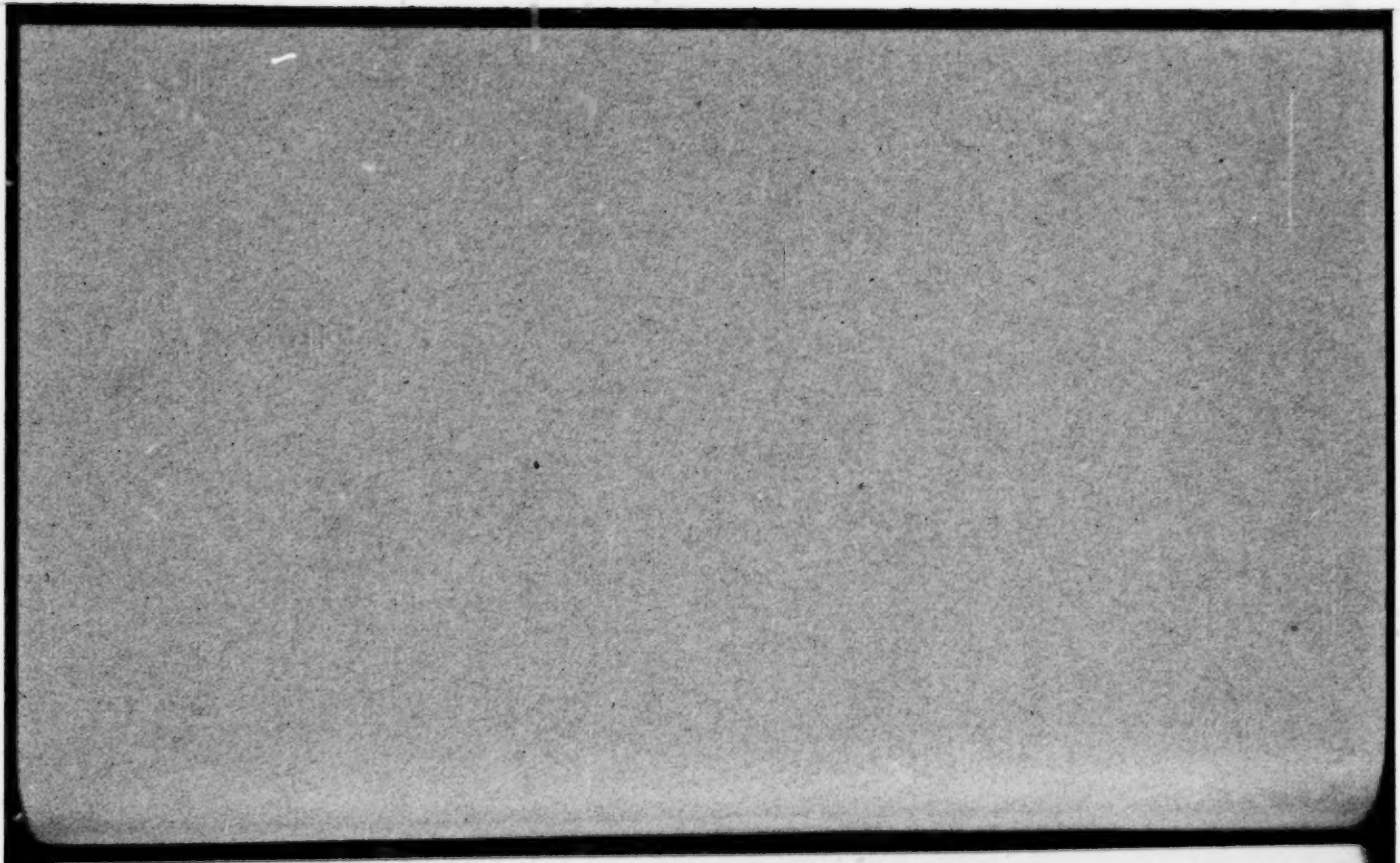

SUBJECT INDEX

PAGE

I. The opinions of the courts below 1

II. Jurisdiction 2

III. Statement of the case 2

IV. Specification of errors 7

V. Argument 8

Summary of argument 8

FIRST POINT—There was no express contract with respect to respondent's liability for negligence 10

SECOND POINT—The contract claimed would not relieve respondent from liability for its tug captain's negligence 13

THIRD POINT—The tug captain who stranded the *Sabine Sun* was respondent's servant 24

FOURTH POINT—The *Sabine Sun* was damaged by the negligence of respondent's tug captain, for which respondent is liable 32

FIFTH POINT—Turnbull did not assume responsibility for Fort's negligence 41

Conclusion 45

Table of Cases.

PAGE

Alaska Commercial Co. v. Williams, 128 Fed. 362 14
Allaguash, 1930 A. M. C. 1981 41
Altee v. Packet Co., 21 Wall. 389 34
American Eagle, The, 54 Fed. 1010 14
Arlington, The, 19 F. (2d) 285 37

Barnstable, The, 181 U. S. 464 23
British Col. M. Tug & Barge Co. v. Mylroie, 259 U. S. 1 ..... 18, 19

Cazavaro v. Planet S. S. Corp., 31 F. (2d) 885 ..... 15, 19
Caspian, The, 14 F. (2d) 1006 ..... 31, 37, 41
Compania de Navigacion v. Firemen's Fund Ins. Co., (The Wash Gray), 277 U. S. 66 .. 14, 17, 18, 19, 20, 21
Cutchogue, The, 10 F. (2d) 671 11

Davidson S. S. Co. v. U. S., 205 U. S. 187 38

Edmund L. Levy, The, 128 Fed. 683 ..... 14, 17, 43
Edward G. Murray, The, 278 Fed. 895 ..... 27, 28, 31, 41

Georgia, The, 31 F. (2d) 759 22
Graves v. Davis, 235 N. Y. 315 ..... 11, 16
Great Lakes Towing Co. v. Alva S. S. Co., 261 Fed. 261 ..... 34, 36

Henry Chapel, The, 10 Fed. 777 34

John G. Stevens, The, 170 U. S. 113 19
Jonty Jenks, The, 54 Fed. 1021 14

Langnes v. Green, 282 U. S. 531 32
Little v. Hackett, 116 U. S. 366 30
Lizzie M. Walker, The, 3 F. (2d) 921 32

Margaret, The, 94 U. S. 494 ..... 19, 35, 41
McNamara v. Leipzig, 227 N. Y. 291 30
Mercer, The, 297 Fed. 981 ..... 19, 21
M. J. Cummings, The, 18 Fed. 178 14
Monarch, The, 231 Fed. 795 15
Moran, In re, 120 Fed. 556 14
Mylroie v. British Col. M. Tug & Barge Co., 268 Fed. 449 15

PAGE

Oceanica, The, 144 Fed. 301 14
Oceanica, The, 170 Fed. 893 ..... 14, 15, 16, 17, 18, 21

Pacific Maru, The, 8 F. (2d) 827 15
Primrose, The, 42 F. (2d) 827 37
Procida, The, 243 Fed. 251 ..... 28, 31, 41

Sacramento Nav. Co. v. Salz, 273 U. S. 326 ..... 19, 21
Sarnia, The, 261 Fed. 900 23
Sea Lion, The, 12 F. (2d) 124 15
Singer Mfg. Co. v. Rahn, 132 U. S. 518 26
Somers N. Smith, The, 120 Fed. 569 ..... 14, 37
Standard Oil Co. v. Anderson, 212 U. S. 215 .... 25, 29, 30
Steamboat New World v. King, 16 How. 469 35
Sternaman v. Metropolitan Life Ins. Co., 170 N. Y. 13 ..... 27, 29
Straus & Co. v. Can. Pac. Ry. Co., 254 N. Y. 407 16
Sturgis v. Boyer, 24 How. 110 ..... 24, 26, 28, 30, 41
Syracuse, The, 12 Wall. 167 ..... 14, 15, 16, 17, 18, 19, 20

Ten Eyck v. Director General, 267 Fed. 974 .. 11, 15, 16, 18
Thompson v. Winslow, 128 Fed. 73 34

U. S. v. Carver, 260 U. S. 482 16
U. S. v. Norfolk-Berkley Bridge Corp., 29 F. (2d) 115 ..... 15, 17

Vim, The, 40 F. (2d) 638 .....15, 36, 42

Wash Gray, The (Compania de Navigacion v. Firemen's Fund Ins. Co.), 277 U. S. 66 ..... 14, 17, 18, 19, 20, 21
Watts, Watts & Co. v. Unione Austriaca, etc., 248 U. S. 9 32
W. G. Mason, The, 142 Fed. 913 ..... 32, 38
White v. Upper Hudson Stone Co., 248 Fed. 893 34
Wilmington Ry. Bridge Co. v. Franco-Ottoman S. Co., 259 Fed. 166 ..... 25, 41

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I.

The Opinions of the Courts Below.

This is a review, on writ of certiorari, of a decision in admiralty of the United States Circuit Court of Appeals for the Second Circuit.

The opinion of the District Court for the Southern District of New York was rendered on November 25, 1930, and is printed at pages 75-9 of the record. It is reported in 48 F. (2d) 598.

The opinion of the Circuit Court of Appeals for the Second Circuit was rendered on January 11, 1932, and is printed at pages 84-9 of the record. It is reported in 55 F. (2d) 63.

II.

Jurisdiction.

This case is within the admiralty and maritime jurisdiction of the United States and of this Honorable Court. The jurisdiction of this Court was invoked by a petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit (October Term, 1931, No. 874), which was granted on May 23, 1932 (R. 90). 285 U. S. (Pre. Print) No. 1, page v., 52 Su. Ct. Rep. 640.

III.

Statement of the Case.

The suit was brought against the respondent and three steamtugs operated by respondent to recover damages resulting from negligent towage of petitioner's tank steamer *Sabine Sun* (R. 1-4). The tugs were exonerated (R. 77, 80-1), but no error was assigned to the dismissal of the libel as to them (R. 82-3). The appeal from the District Court decree was directed to the dismissal as against the respondent (R. 81) and the case no longer involves the tugs but is only between petitioner and respondent.

The facts involved in the case are as follows:

Petitioner, a New Jersey corporation with its principal office in Philadelphia, was the owner and operator of the tank steamer *Sabine Sun* (R. 14). Respondent is a corporation engaged in towing in and about New York Harbor (R. 5, 64) and, at the times involved in the litigation, operated, among others, the steamtugs *W. F. Dalzell, Dalzellite* and *Fred B. Dalzell, Jr.* (R. 61).

In November and December, 1923, and in June, 1924 (R. 63-4, 70, 72), respondent mailed schedules of its towing rates

to employees of Sun Oil Company (petitioner) in response to their inquiries about towing rates and charges for past towage services (R. 63, 69, 70). These rate schedules (R. 64-8) were entitled "Pro Forma Towage Rates and Contract with Dalzell Towing Company, Inc.," and quoted rates for towing, docking and shifting vessels, provisions in regard to holidays, overtime, detention and the supplying of steam by tugs, a schedule of running time between points around New York Harbor, and at the very end a clause with the heading "Pilotage" which stated that any tug captain going on a steamer using her own propelling power would become the servant of the owners of the steamer and that the towing company would not be liable for any damage resulting from his handling of the steamer or tugs. The clause is quoted at page 13 of this brief.

On two bills sent by respondent to petitioner around the same time, in October, 1923, and May, 1924, for towing the *Sabine Sun* and *Delaware Sun,* the same clause appeared in very fine print at the bottom of the bill form (R. 68-9, 71-2).

On May 14, 1925, *a year or so after receipt of these "pro forma" schedules of rates and the two bills for towage services,* petitioner's tank steamer *Sabine Sun* came into New York harbor with a cargo of oil on her way to the Texas Company dock at Bayonne, New Jersey (R. 14-5). Petitioner's assistant marine superintendent, Turnbull (R. 14), had come up from Philadelphia and he arranged to lighter sufficient cargo at Stapleton, Staten Island, to get the vessel's draft down to 24 feet before proceeding up into Newark Bay (R. 18, 75).

On the afternoon of May 14, 1925, Turnbull requested respondent by telephone *to take the Sabine Sun from Stapleton to Bayonne, and respondent agreed* (R. 14-5). Turnbull informed respondent that the vessel would be lightered to a 24-foot draft and ready for the movement to Bayonne on the

following day (R. 14, 75), but nothing was said about the number of tugs to be furnished (R. 15). At the time Turnbull did not know anything about the above pilotage clause in respondent's towage schedule (R. 18-19, 21, 29), and nothing was said about pilotage (R. 29), although it was expected that respondent would furnish a competent man to take charge (R. 25, 29-30).

After the steamer's draft was brought down to 24 feet, on May 15 (R. 18, 75), respondent's tug *W. F. Dalzell* (R. 32) came alongside at Stapleton (R. 15) and her captain, Bennett, went on the steamer's bridge to take charge of the movement (R. 5-6, 15, 47, 75). Neither Turnbull nor the master of the *Sabine Sun* asked Bennett to come on the steamer or to take charge (R. 15-16).

Captain Bennett took over the handling of the steamer and they proceeded toward Kill van Kull (R. 32, 47, 16). The *Sabine Sun* was under steam and Bennett's tug was proceeding with her. When near St. George, Staten Island, respondent's tug *Dalzellite* met them and tied up alongside (R. 15, 75), but her captain did not go onto the steamer (R. 16).

About off Port Richmond, Staten Island, respondent's third tug, the *F. B. Dalzell, Jr.*, joined them (R. 16, 31-2, 42), and her captain, Fort, went on the *Sabine Sun's* bridge to take charge, relieving Captain Bennett (R. 16, 32, 43, 47) who, nevertheless, remained on her bridge (R. 16, 43, 48, 76). Neither Turnbull nor the steamer's master requested Captain Fort to come aboard or to relieve Bennett (R. 16, 19).

Fort had been directed by respondent to take charge of the movement (R. 43, 47), and the day before he had gone down to Newark Bay to find out the depth of the channel (R. 33, 42-3). He thought that "the channel was only good for 24 feet before that," but the Army Engineers were claim-

ing there was 30 feet at that time (R. 45). Although the *Sabine Sun* was only drawing 24 feet (R. 18, 74, 75), and Turnbull had so advised respondent (R. 14-15, 75), Fort said respondent had told him she would draw 25 feet 6 inches (R. 40) and he wanted to verify the Army Engineers' information that the channel was deep enough. He took soundings at low water (R. 45) which showed 26 to 30 feet of water in the channel and 23 to 24 feet outside (R. 43). He was testing the depth of the channel itself (R. 43), and did not sound at the place where he later grounded the *Sabine Sun* (R. 42-3).

Fort testified that he considered these waters rather difficult (R. 33, 42), and, in addition to sounding the channel, he secured information from the Army Engineers regarding the conditions around Bergen Point, including a blueprint and chart (R. 35). Although he obtained these plans as a preliminary precaution, he claimed that he was familiar with the waters (R. 37, 39) and did not need markings or aids to navigation (R. 39, 40).

The time and conditions were right for this movement, the weather fair and clear with little or no wind, and the tide around the last of the flood, about an hour before high water (R. 32). Fort placed the tug *W. F. Dalzell* on the steamer's port bow, the *F. B. Dalzell, Jr.* (his tug) on the steamer's port stern, and the *Dalzellite* on her starboard bow, the latter tug being expected to break any possible shear that might be taken while the steamer and tugs were going up into Newark Bay (R. 34). From the bridge of the *Sabine Sun* he was in complete charge and directed the maneuvers (R. 16, 19, 32, 43), using the ship's engines and giving orders to the tugs and to the men at the wheel and telegraph of the steamer (R. 34, 46).

On reaching the mouth of Newark Bay it was necessary to make a sharp turn to starboard and proceed up a channel

about 500 feet wide (R. 55, Exhibit K) running between Shooters Island, off to the port, and Bergen Point Light to starboard (R. 52). The blue print used by Fort (Exhibit K) shows a 30-foot channel 500 feet wide, the middle of which is about 600 feet from the end of the long pier at Shooters Island. He never took the *Sabine Sun* within 800 feet of that pier (R. 38-9), although he admitted that one should try to keep in the middle of the channel (R. 46).

On turning into Newark Bay, Fort used a street and gas tank on shore as ranges by which to navigate (R. 34, 38), instead of the channel which he had found by sounding (R. 43); and by keeping on these ranges he ran the *Sabine Sun* hard aground (R. 16, 36, 6), a rock piercing her No. 1 starboard tank about 69 feet aft of her stem (R. 17, 74). Captain Fountain, a disinterested expert familiar with those waters, testified that the *Sabine Sun* was out of the channel where she lay aground on this rock (R. 52), and the District Court so found (R. 77).

The *Sabine Sun* remained aground about three hours (R. 29, 6, 76), during which time some of her cargo of oil was lightered from the forward tanks, and some was run back into the after tanks by gravity (R. 17, 18, 6, 76) in order to get her bow up so she would come off the rock. Fort asked the captain of an outside tug, Fountain, to come on the bridge of the steamer and assist him (R. 53). Fountain took charge (R. 54, 76-7), and, after the steamer was pulled back into deep water, he made the turn into Newark Bay and proceeded up the channel, the same waters that Fort should have followed, and she arrived at her destination without further incident (R. 54, 55, 18).

It was on these facts that petitioner sought to recover from respondent and the tugs for the negligent stranding. There was no evidence or claim of anything defective or unusual in the ship, and it was admitted that her master was not at fault (R. 62). The tugs were exonerated because Fort

testified that they obeyed all his orders and did everything required of them (R. 46-7, 77). Respondent's own evidence was that the stranding occurred at a point where its tug captain in charge intentionally took the steamer, that is, on shore ranges purposely adopted by him (R. 36-8, 40).

The District Court and the Circuit Court of Appeals did not pass upon the question of the negligence in stranding the *Sabine Sun,* but both held that the pilotage clause appearing at the end of the rate schedules which were sent by respondent to petitioner in 1923 and in June, 1924, was a part of the contract made by respondent over the telephone in May, 1925, to take the *Sabine Sun* up to Bayonne (R. 77, 87); and, although negligence on the part of respondent's tug captain is not mentioned in that pilotage clause, that it nevertheless barred any recovery by petitioner (R. 79, 89) whether the damage was caused without fault, by negligence, or even wantonly.

IV.

Specification of Errors.

The Court below erred in holding:

(1) That respondent relieved itself of liability, and petitioner assumed all risks of respondent's handling the S.S. *Sabine Sun;*

(2) That there was an express contract regarding pilotage between petitioner and respondent;

(3) That the pilotage clause in respondent's rate schedule constituted, or was part of, a valid contract relieving respondent of any liability to petitioner;

(4) That the pilotage clause, and the contract between the parties, covered negligence of respondent's tug captain while on the *Sabine Sun;*

(5) In effect, that respondent's tug captain was petitioner's servant, irrespective of the facts in evidence; and

(6) In failing to hold that respondent was liable for the negligent stranding of the *Sabine Sun* by its tug captain in charge.

V.

Argument.

Summary of Argument.

This case was decided by the lower courts entirely on the pilotage clause. They declined to pass upon the legal liability of respondent aside from the alleged contract with that clause. The decree below is contrary to the law as decided by this Court and should be reversed for the following reasons:

(1) Respondent contracted *to take the Sabine Sun* from Stapleton to Bayonne, and undertook the movement with three tugs and the captain of one of them in complete charge of both the ship and the tugs. By such an undertaking respondent impliedly agreed to supply capable tugs and a competent and reasonably careful man to take charge, and the law imposed a duty on it not to cause injury to the *Sabine Sun,* either through its tugs, captains, or crews.

(2) The man furnished by respondent to take charge was bound to know the channel, its depth, tides and currents, and how to direct the movement successfully. Respondent, as an independent contractor, would be liable for any damage resulting from his incompetence or negligence.

(3) Respondent's tug captain stranded the *Sabine Sun,* outside the channel, while in the performance of respondent's contract. Taking her outside the channel could be due only

to incompetence or negligence. There was no *vis major,* and there is no proof in the case to overcome the strong legal presumption of negligence.

(4) The pilotage clause in respondent's rate schedule, sent to petitioner about a year before, was not a part of the contract *to take* the *Sabine Sun* to Bayonne; and, in any event, a contract to tow or take a vessel without liability would not cover negligence. If it were intended to exempt from liability for negligence, it would be invalid as a matter of law.

(5) Even if the pilotage clause was a part of the towage contract, the tug captain in charge was not, in fact or in law, a servant of petitioner. His conduct, and respondent's, contradicted such a relationship and displaced the pilotage clause. He was selected, employed, paid and controlled by respondent, and was respondent's servant engaged in performing respondent's work.

(6) The case should be decided on the evidence of the unexplained stranding outside the channel, and on the law which imposes upon a towing company the duty not to cause injury to the vessel which it has contracted to transport from one place to another.

As the courts below held that there was a contract which relieved respondent of the liability imposed by law for negligence, and therefore did not pass on the points raised in paragraphs 1, 2 and 3 above, we will first direct our argument to the existence and effect of the contract claimed; and, as this is a trial *de novo* in admiralty, we will then discuss the law which should have been applied.

FIRST POINT.

There was no express contract with respect to respondent's liability for negligence.

In view of the decision (under review) that the parties contracted that respondent would not be liable for damage resulting from its tug captain's handling of the *Sabine Sun* and the tugs, it is first necessary to inquire whether there was in fact such a contract. The evidence which is claimed to spell out an agreement to that effect does not indicate any meeting of the minds of the contracting parties.

Respondent does not deny that it was an independent contractor as to the tugs, but it claims that a different relationship existed between petitioner and its tug captain, Fort,—the supervisor of the entire towage service. There was no contract between petitioner and Fort, but respondent seeks to create one out of the pilotage clause (R. 67-8) appearing in the rate schedules and bills sent to petitioner's employees eleven months and more before the towage service was engaged.

Two bills sent in October, 1923, and May, 1924, were for past services (R. 68-9, 71), and of course did not constitute any part of a future contract.

The schedule was primarily a statement of the then current rates for towage. It was sent to petitioner's employees in response to their letters inquiring about charges made (R. 63, 69, 70-1), and in the letters of transmittal it was referred to as a "towage schedule" or "tariff rates." It was not in the form of a contract, nor even of an offer.

This schedule was entitled "Pro Forma Towage Rates and Contract." It is not a contract in itself, and its author did not advise those to whom it was sent that it was an offer. We do not know why respondent chose to make the docu-

ment *pro forma,* but it would seem likely that it was intended that respondent could not be bound by it. If a shipowner, after receipt of one of these schedules, should obtain towage services and insist on paying at the rates stated therein, respondent could justifiably say that the schedule was only "pro forma" and the rates stated not binding on it.

The most that this schedule could be considered is a quotation, or bid for offers; but, if treated as a bid for offers, the pilotage clause would not be a part of a subsequent offer from the person to whom the quotation was made, unless the schedule gave notice that the rates stated were subject to, or conditioned on, that clause. But there was no such notice in this schedule, and the offer to engage tugs in May, 1925, was not at the rates quoted for 1923 and 1924,—unless they happened to be the then current rates for such service.

In many of the cases where courts have found a contract with a similar towage condition, it was clear that the owner of the tow was notified that service would be supplied *only on the condition.* Express notice was given that, from then on, towage would be furnished only on the understanding that the towing company would not be responsible for negligence. *Ten Eyck* v. *Director General* (1920 C. C. A. 2), 267 Fed. 974; *Graves* v. *Davis* (1923), 235 N. Y. 315; *The Cutchogue* (1926 C. C. A. 2), 10 F. (2d) 671.

Here there was no such notice, and the words *"pro forma"* in the title of the document preclude the clause being held out as a necessary condition.

Clearly, the schedule was not an offer as petitioner had no right, of acceptance or otherwise, based upon its receipt. *The "pro forma" rates negative any offer.* There is no evidence that the schedules sent in 1923 and 1924 were in effect in 1925, nor that the charge made for this service was at the 1923 or 1924 rates (R. 21). Petitioner's use of the schedules

was in checking the charges on past towage bills. They were not sent as offers for future business.

Even if this schedule had not been merely *pro forma,* but had been intended as an offer, we submit that it should not be construed as a part of a contract made a year after, without both parties having it in mind. Turnbull had no knowledge that the clause was a condition of his engagement of the tugs (R. 18). He could not have constructive knowledge without notice that it would be a condition, or that it was the only terms on which respondent would furnish tugs. A meeting of the minds, either actual or in contemplation of the law, is necessary to the creation of a contract; and to support its affirmative defense, respondent had the burden of proving this necessary element of a contract.

To hold that there was a meeting of the minds is to contradict the evidence. We see no reason why petitioner should be required to remember this clause, *which was never stated as a condition of the towage,* when respondent, the party for whose benefit it is claimed, could easily have made it a true condition of the contract at the time the services were engaged. To make such a contract for its own benefit, respondent should be required to give notice in definite terms, not merely by an ambiguous *pro forma* document. Respondent should not be allowed to avoid duties the law imposes on it by such equivocation.

SECOND POINT.

The contract claimed would not relieve respondent from liability for its tug captain's negligence.

The pilotage clause in respondent's *pro forma* schedule (R. 67-8) is as follows:

> "When the captain of any tug furnished to or engaged in the service of assisting a vessel which is making use of her own propelling power goes on board said vessel, or any other licensed pilot goes on board said vessel, it is understood and agreed that said tugboat captain or licensed pilot becomes the servant of the owners of the vessel assisted in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service and in respect to the handling of such vessel, and neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents or charterers shall be liable for any damage resulting therefrom."

For the purpose of this point, we will assume that respondent contracted to take the *Sabine Sun* up to Bayonne on the understanding that it, as the one "furnishing the tugs and/or pilot," would not be liable for any damage resulting "from the giving of orders to any of the tugs" or from "the handling of" the steamer by the tug captain-pilot on the steamer's bridge. It is our interpretation of the pilotage clause that it only purports to relieve respondent of liability if and when the tug captain-pilot is the servant of the steamer, but the Circuit Court of Appeals held that it has the same effect regardless of whose servant he may be and we will first direct our argument to the alleged contract as so construed. The question of agency will be reserved for our next point.

Of contracts to tow at the risk of the tow this court said in *The Steamer Syracuse* (1870), 12 Wall. 167, 171:

> "It is unnecessary to consider the evidence relating to the alleged contract of towage, because, if it be true, as the appellant says, that, by special agreement, the canal-boat was being towed at her own risk, nevertheless, the steamer is liable, if, through the negligence of those in charge of her, the canal-boat has suffered loss. Although the policy of the law has not imposed on a towing boat the obligation resting on a common carrier, it does require on the part of the persons engaged in her management, the exercise of reasonable care, caution, and maritime skill, and if these are neglected, and disaster occurs, the towing boat must be visited with the consequences."

This language was approved, and the principal reiterated in *The Wash Gray* (*Compania de Navigacion* v. *Firemen's Fund Ins. Co.*) (1928), 277 U. S. 66, 73-4.

The law as laid down in *The Steamer Syracuse* was consistently followed and applied in all circuits until 1909. *The M. J. Cummings* (1883 N. D. N. Y.), 18 Fed. 178; *The American Eagle* (1893 D. C. Ohio), 54 Fed. 1010; *The Jonty Jenks* (1893 N. D. N. Y.), 54 Fed. 1021, 1023; *The Somers N. Smith* (1903 D. C. Me.), 120 Fed. 569, 576; *In re Moran* (1903 E. D. N. Y.), 120 Fed. 556, 558; *Alaska Commercial Co.* v. *Williams* (1904 C. C. A. 9), 128 Fed. 362, 366; *The Edmund L. Levy* (1904 C. C. A. 2), 128 Fed. 683, 684; *The Oceanica* (1906 W. D. N. Y.), 144 Fed. 301, 305.

In *The Oceanica, supra,* the District Court said of the *Syracuse* holding, "This principle of maritime law remains unimpeached"; but on appeal the Circuit Court of Appeals for the Second Circuit did impeach the principle and reversed the District Court, by a divided court, refusing to follow *The Syracuse. The Oceanica,* 170 Fed. 893. It tried to distinguish *The Syracuse* and treated the above quotation as mere

dictum, but confessed the futility of this attempt by saying, "Still, it must be admitted that the learned judge was speaking of a special agreement entered into between the tug and the tow that the latter should be towed at her own risk."

On rehearing, the majority gave up attempts to distinguish, saying:

> "We do appreciate keenly that the decision of the majority of the court as to the right of the tug to contract against her own negligence is a departure from previous decisions." Page 900.

After *The Oceanica* appeal the courts in the second circuit followed its new statement of the law; but *The Syracuse* was followed in the other circuits. The *Monarch* (1916 N. D. Fla.), 235 Fed. 795; *Mylroie* v. *British Columbia Mills Tug & Barge Co.* (1920 C. C. A. 9), 268 Fed. 449; *The Sea Lion* (1926 N. D. Cal.), 12 F. (2d) 124; *U. S.* v. *Norfolk-Berkeley Bridge Corp. et al.* (1928 E. D. Va.), 29 F. (2d) 115, 118; *Calzavaro* v. *Planet S. S. Corp. et al.* (1929 C. C. A. 4), 31 F. (2d) 885; *The Vim* (1930 D. C. R. I.), 40 F. (2d) 638.

The leading case in the second circuit since *The Oceanica* is *Ten Eyck* v. *Director General of Railroads* (1920), 267 Fed. 974, which has been followed there in many other cases where the courts refused to apply the rule of *The Syracuse* or to follow the adjudications in other circuits. The only decision outside the second circuit that has followed the *Ten Eck* case is *The Pacific Maru* (1925), 8 F. (2d) 166, where the clause *expressly covered negligence* and where the District Court in Georgia took the position that the quoted language from *The Syracuse* was dictum. The District Court sitting in Florida (the same circuit), however, followed *The Syracuse*. *The Monarch, supra.*

Most of the cases in the second circuit since *The Oceanica* involved contracts specifically exempting the towing com-

pany from liability for negligence (as in *Ten Eyck* v. *Director General, supra*), but the courts of that circuit have refused to follow this Court, and have applied the same rule in cases where negligence was not mentioned.

The Court of Appeals of the State of New York also held a similar contract *expressly covering negligence* to be valid (*Graves* v. *Davis,* 235 N. Y. 315), but the New York courts, up to that time, had always held that even common carriers might contract against negligence. That New York rule was not changed until the decision in *Straus & Co.* v. *Canadian Pac. Ry. Co.* (1930), 254 N. Y. 407.

The situation at present is that there is a direct conflict in the federal courts, but the preponderance of the rule laid down by this Court is shown by the following table:

Where Held Invalid.	*Where Held Valid.*
U. S. Supreme Court.	
First Circuit.	Second Circuit.
Fourth Circuit.	Fifth Circuit (Georgia).
Fifth Circuit (Florida).	
Sixth Circuit.	
Ninth Circuit.	

Such contracts were also held invalid in the second circuit before the decision, by a divided court, in *The Oceanica, supra.*

Certiorari was refused in *The Oceanica, supra,* (215 U. S. 599), and in *Ten Eyck* v. *Director General, supra,* (254 U. S. 646), notwithstanding they were contrary to the decision in *The Syracuse;* but this Court has repeatedly pointed out that such a denial does not mean that it approved the law laid down by the lower court. *United States* v. *Carver* (1923), 260 U. S. 482, 490.

When the Circuit Court of Appeals for the Second Circuit undertook, in *The Oceanica,* to overrule the principle of law

stated in *The Syracuse, supra,* Judge WARD said, *"The Syracuse* has never been cited on this point in any subsequent case in the Supreme Court arising out of a towage contract"; but this Court has now cited the case on the very point, and, contrary to Judge WARD'S opinion, has said that it meant exactly what it previously said in *The Syracuse.* This Court's reiteration of the legal principle, in *The Wash Gray* (*Compania de Navigacion* v. *Firemen's Fund Ins. Co.*), 277 U. S. 66, 73-4, has been recognized as settling the conflict in *U. S.* v. *Norfolk-Berkley Bridge Corp., supra.* A different argument from that of Judge WARD is necessary if the rule of *The Oceanica* is to be upheld.

The fact that respondent was not a common carrier in relation to the *Sabine Sun* does not keep it without the pale of public policy. Its liability does not depend on its contract, but is imposed by law. *The Edmund L. Levy, supra,* page 684. Liability for the tort should not be allowed to be destroyed by an extortionary contract which (if it is extended to cover negligence) attempts to allow recklessness and a wanton disregard of the safety of property entrusted to the towing company. As Circuit Judge COXE said in the dissenting opinion in *The Oceanica:*

> "The wisdom of the rule cannot be doubted. It ought to be against public policy to permit a vessel to contract against her own fault. To allow her to do so begets recklessness, carelessness and neglect. The same reasons for prohibiting such a contract in the case of common carriers apply, though not, perhaps, to the same extent, in the case of a towage contract. In both cases the design is to prevent those who have the absolute control of another's property from extorting an agreement that they may neglect all reasonable precautions to preserve it. I can see no reason for abrogating the rule and every reason why it should be continued." Page 896.

Whether or not public policy would prohibit a towing company contracting against liability for its own or its servants' fault, it should prevent reading into its contract such an exemption where negligence is not expressly covered.

It has been pointed out that *Ten Eyck* v. *Director General, supra,* differed from *The Oceanica* and *The Syracuse* in that the contract there involved *expressly covered negligence.* It may be that this Court would sustain the validity of the *Ten Eyck* contract on that account, but in view of the decision in *The Syracuse* and *The Wash Gray,* it clearly could not agree with *The Oceanica* decree nor with the decision against the *Sabine Sun.* The clause applied against the petitioner did not specify negligence, and exemption from liability for negligence should not be read into it in favor of its author, the respondent.

In *British Columbia Mills Tug & Barge Co.* v. *Mylroie* (1921), 259 U. S. 1, the towing contract contained a clause as follows:

> "That the Tug will render to the Barge 'Bangor' reasonable assistance from time to time in any emergency which might arise, and while discharging at Anchorage the Tug is to be within call of the Barge at all times to render such reasonable assistance in case of any emergency that might arise. The Tug Company is not to be held liable for any damage which might happen to the said barge 'Bangor' or its cargo while in tow or at anchor." Page 11.

This Court found it unnecessary to pass upon the validity of the last sentence of that clause, which sought exemption from liability, because it held that the clause *did not cover negligence* of the towing company's tugs or servants. It held that exemption from liability for negligence would be inconsistent with the contract to take all reasonable means to successfully tow the barge, and that therefore the clause

should be read as though it provided that the towing company would not be liable unless it failed to take all reasonable means agains injury to the tow.

In the case at bar respondent agreed, at petitioner's request, *to take* the *Sabine Sun* to Bayonne. This constituted a contract to furnish tugs and crews, with a competent man in charge, to use reasonable care to move the vessel. It is what both this Court and the Circuit Court of Appeals for the Second Circuit have classified as a towage service. *Sacramento Nav. Co.* v. *Salz* (1927), 273 U. S. 326, 328; *The Mercer* (1924 C. C. A. 2), 297 Fed. 981, 984. Here, however, it was held that that contract for reasonable care also included the pilotage clause. But applying the reasoning of this Court in the *Mylroie* case, the alleged contract between petitioner and respondent was that respondent would not be liable for damage resulting from the giving of orders to the tugs or from the handling of the steamer by respondent's tug captain in charge, *unless he failed to use reasonable care in directing the tugs and steamer.* The courts below did not apply the same rule, but read into the contract an exemption from the liability imposed by law for any negligence of respondent's tug captain, no matter how gross.

In any towage service *the law imposes* on the towing company or tugs the duty to exercise reasonable skill and care, through its representatives in charge, in the performance of the work. *The Margaret* (1876), 94 U. S. 494, 497. A suit for negligent towage is *ex delicto* and not *ex contractu. The John G. Stevens* (1897), 170 U. S. 113, 124-5.

The contract claimed here differs only in its wording from the "owner's risk" contracts involved in *The Syracuse* and *The Wash Gray.* That their legal effect is the same, was recognized by the Circuit Court of Appeals for the Fourth Circuit in *Calzavaro* v. *Planet S. S. Corp. et al., supra.* The District Court and the Circuit Court of Appeals in following

the overruled *Oceanica,* said that *The Wash Gray* was distinguishable, but we submit that the proposition of law is the same. The distinction is merely in the facts and the wording of the contracts. Both contracts were for services by a towing company which sought to escape all liability for negligence.

In the *Wash Gray* case the *Freeport Sulphur No. 1* undertook to tow the *Wash Gray* under an agreement that the *Freeport* would not be "responsible in any way for loss or damage to the *Wash Gray.*" After her loss through negligence of the *Freeport,* the owner of the *Wash Gray* sued her underwriters, who set up the defense that their policies prohibited any agreement by the insured vessel lessening or destroying her right of recovery against any other vessel, and consequently the underwriters' right of subrogation. This Court held that the defense was without merit because the owners of the *Wash Gray* would have a valid claim against the *Freeport* for any damage caused by the *negligence* of her captain or crew, notwithstanding the contract that the *Freeport* would not be responsible *in any way* for loss or damage. In passing on the contract this Court quoted with approval from the *Syracuse,* and said:

> "It did not release the *Freeport* from any loss or damage to the *Wash Gray due to the negligence* of the master or crew of the towing vessel." Page 37. (Italics ours.)

If a contract that the towing vessel "is not responsible *in any way*" does not cover negligence, how could one merely providing that the towing company would not "be liable for any damage resulting" from the handling of steamer or tugs by the towing company's tug captain in charge? Certainly, the inclusion of the words "in any way" in the *Wash Gray* contract would not make it less comprehensive than the alleged *Sabine Sun* contract.

After agreeing with *The Oceanica* in its attempt to overrule *The Syracuse,* and stating that *The Wash Gray* is distinguishable, the Circuit Court of Appeals treated the respondent's agreement as merely one to supply a pilot to a navigating vessel (R. 89). Such a construction is not justified, because the agreement was *to take the Sabine Sun to Bayonne,* and the pilotage was merely an incident to the contract to transport. It was necessary for respondent to pilot the vessel if it was to take her there. It is unwarranted distortion to ignore the real contract "to take" and consider only the pilotage clause, which, in any case, could only be *a part* of the towage contract. Respondent's tug captain directed both the steamer and the tugs.

In the courts below, and in its brief in opposition to certiorari, respondent argued that its contract was not one of towage but one of pilotage. The service was none the less towage merely because the steamer's engines and steering apparatus were operated by her crew *in the way they were told by the tug captain in charge of tugs and steamer.* Having contracted *to take* the steamer from point to point, it was respondent, acting through its tug captain, who was "making use of her propelling power." Petitioner did not insist on her engines being used.

In *Sacramento Nav. Co.* v. *Salz, supra,* this Court stated the following clear definition:

> "Towage service is the employment of one vessel to expedite the voyage of another." Page 328.

In *The Mercer, supra,* the Circuit Court of Appeals for the Second Circuit said:

> "Towage service is * * * aid rendered in the movement of vessels not in distress, * * *." Page 984.

The *Sabine Sun* was not in distress, but respondent was engaged to expedite her voyage.

Respondent's counsel has argued that respondent did not supply towage to the *Sabine Sun,* but its tugs merely assisted her to navigate. Her "navigation" was by respondent's tug captain, and the tugs were likewise directed by him. It was not a case of separate direction of tugs and steamer; but Fort directed both as separate parts of the flotilla. Counsel claims that any time a towing company moves a vessel under steam, she is merely assisted, but it is as reasonable, and we think more logical, to consider the steamer's engines as assisting the towing company which contracts to move her. *The Georgia* (1927 W. D. N. Y.), 31 F. (2d) 759, 760, aff'd 31 F. (2d) 761. In referring to the *Sabine Sun,* Fort said, "We were using her engines" (R. 34), a recognition that the steamer was being used to assist respondent.

It is interesting to note that respondent itself considered this as a towage service,—until, in litigation, its counsel persuaded it otherwise. In respondent's bill of October 16, 1923 (R. 68-9), a similar service to the *Sabine Sun* was charged for as "Towing from Pier 2 Tide Water Docks, Bayonne to Staten Island (Light, Steam)"; and on May 9, 1924, respondent moved the S.S. *Delaware Sun, under steam,* and billed petitioner for "Towing from East side Pier 5, Constable Hook to Staten Island" (R. 71). If respondent does not know the claimed difference, how can petitioner be expected to know that what respondent calls "towing" is really "assisting"?

Respondent has cited cases in its earlier briefs for the propositions that a towed vessel not under steam has a maritime lien on a tug for negligence of the tug's captain in charge, but that a vessel whose propelling power is used together with tugs has no lien on the tugs for errors of the captain of one of them who is supervising the movement from the steamer's bridge. These cases are used by respondent to support the fallacious argument that the maritime lien against the tugs depends on whether the vessel receiving the

towage service is under steam. But for the fact that the Circuit Court of Appeals appears to have accepted this argument (R. 89), we should consider it unworthy of consideration here.

The true distinction in the cases cited by respondent is in the person or thing negligent. Where the tug captain is on his tug, his negligence in her operation is, in legal contemplation, the negligence of the tug. A tug, being an inanimate thing, cannot be negligent except through its owner (unseaworthiness) or some person on, or in charge of, it. In admiralty, however, any vessel is considered negligent if those on her are negligent (*The Barnstable* (1901), 181 U. S. 464, 467-8); and that negligence by legal fiction creates a maritime lien when it causes damage to others.

The fiction of negligence on the part of the inanimate tug does not extend to make her negligent where the actual negligence is that of someone not on or in charge of her,—except, of course, in cases of unseaworthiness. Where a tug (those operating her) obeys all orders of a person on another vessel, it is not liable *in rem* unless the orders are so clearly wrong that those operating the tug must be charged with notice and therefore negligent in obeying. In this case the tugs obeyed all of Fort's orders (R. 46-7), and therefore could not be held liable *in rem*. It was because the evidence indicated that they obeyed *apparently reasonable* orders from Fort that no appeal was taken as to them.

The Sarnia (1919 C. C. A. 2), 261 Fed. 900, cited below by respondent, and by the Circuit Court of Appeals in its opinion (R. 89), does not support the distinction which respondent contends for. There, as here, the tug obeyed the orders of the tug captain who was on the bridge of a vessel under steam, and was not herself at fault. The District Court held the tug and steamer both liable, but the Circuit Court of Appeals found that the collision was due to the failure of the steamer's engine crew to obey orders from the bridge, and

therefore held the steamer solely at fault. In the present case there is no evidence of a failure of the engines or steering apparatus of the *Sabine Sun*.

Respondent's argument might have some weight if our claim were against the tugs, but the claim in this Court is only against respondent; and respondent is liable whether its negligent tug captain was on a tug, on a vessel under steam, or on a vessel without steam. Respondent's liability is not based on any maritime lien. It should be sufficient answer to this argument that we are only claiming a right *in personam*. If the *Sabine Sun* had been without steam, and Fort had piloted from her bridge without using her engines or steering apparatus, there would not be any maritime lien against any of respondent's tugs, but there would have been the same liability *in personam* of respondent.

THIRD POINT.

The tug captain who stranded the *Sabine Sun* was respondent's servant.

The two tug captains were respondent's servants before they took charge of the movement of the *Sabine Sun*. They started out as employees of an independent contractor (*Sturgis* v. *Boyer et al.*, 24 How. 110, 123), and there was no change in their status unless through the pilotage clause provision that "When the captain of any tug furnished * * * goes on board said vessel * * * it is understood and agreed that said tug boat captain * * * becomes the servant of the owners of the vessel * * *" (R. 67-8).

They both went onto the *Sabine Sun* under respondent's orders (R. 43) and without consulting, or being requested by, petitioner (R. 16, 19). *Petitioner had no contract with either of them,* did not choose them, and gave them no orders or instructions. Indeed, the second tug captain, who

stranded the steamer, was ordered by respondent to relieve the first one (R. 43), and remained under respondent's orders, and intended to serve respondent (R. 36), while in the very service in which it is claimed he was petitioner's servant (R. 44).

Bennett, respondent's first tug captain to go on the steamer's bridge, was "in charge of the maneuver" (R. 47) until he was relieved by Fort (R. 43). Fort testified that respondent "told me * * * that the ship was bound in, and for me *to take charge of it*" (R. 43), and "I got *orders* to go aboard the ship" (R. 44). The ship had been under way with two tugs for some time when Fort took charge intending not to complete respondent's undertaking but to "take the ship back to anchorage" unless those on her would assume all risks (R. 36). As Fort himself put it, "These are my orders" (R. 44). He was accepting his orders from respondent, instead of from petitioner, at the time when we are asked to believe he had no authority from, or connection with, respondent.

If the pilotage clause made Bennett petitioner's servant, he could not be taken off and another substituted without petitioner's consent; but respondent did displace him with Fort (R. 43) without consulting petitioner (R. 16, 19). The power of substitution or discharge is an important element in determining the employment. *Standard Oil Co.* v. *Anderson* (1909), 212 U. S. 215, 225. These men could not remain under respondent's control, allowing respondent's order to take precedence over any that petitioner could give, and be legally petitioner's servants. They could not be under respondent's orders and at the same time be petitioner's employees.

The master of the *Sabine Sun* did not contribute to the stranding (R. 62), and her crew did nothing except carry out Fort's instructions,—they were merely used by him. *Wilmington Ry. Bridge Co.* v. *Franco-Ottoman S. Co.* (1919

C. C. A. 4), 259 Fed. 166, 171. There was no claim of unseaworthiness against the steamer. As this court said in *Sturgis* v. *Boyer, supra,* at page 125:

> "Without repeating the testimony, it will be sufficient to say, that it clearly appears in this case that those in charge of the steam tug had the exclusive control, direction, and management, of both vessels, and there is not a word of proof in the record, either that the tug was not a suitable vessel to perform the service for which she was employed, or that anyone belonging to the ship either participated in the navigation, or was guilty of any degree of negligence whatever in the premises."

The status of these men is well illustrated by inquiries into their rights and petitioner's responsibility to them. Would petitioner be liable for damage to their own tugs caused by their negligent orders in compliance with respondent's instruction to them, and contrary to petitioner's wishes or instructions? If either of them was injured, without any fault of petitioner, would petitioner be liable to them for maintenance and cure? Or, could they recover from petitioner, regardless of their contributory negligence, under the Jones Act (Merchant Marine Act, 1920, §33)? The answer to each of these inquiries must be in the negative; because the tug captains were not servants or employees of the shipowner (petitioner).

We concede that one can lend his servants so that they become servants of another in particular work done *for and under the direction of such other,* but Fort was working under the direction of respondent, and as this Court said in *Singer Mfg. Co.* v. *Rahn* (1889), 132 U. S. 518:

> "The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as

> the result to be accomplished, or, in other words, 'not only what shall be done, but how it shall be done.'" Page 523.

The transporting of the *Sabine Sun* was not done under petitioner's direction, but respondent retained, or at least exercised, the right "to direct the manner in which" it should be done. Fort admitted that he did not submit to petitioner's direction, but, on the contrary and pursuant to respondent's instructions, himself told petitioner what he would do and how he would do it.

We agree with the Circuit Court of Appeals that "a person who merely supplies a pilot" *can,* by express agreement, exempt himself from liability for the negligence of a competent pilot so supplied to be the agent of the ship piloted (R. 89). But this was not merely a contract to supply a pilot; it was a contract to move a vessel with the aid of tugs, and pilotage was one of the necessary elements of the complete undertaking. By its engagement to take the *Sabine Sun* to Bayonne respondent not only promised to furnish tugs, but "also promised to furnish some one who would tell all the tugs (and the steamer) what to do." *The Edward G. Murray* (1922 C. C. A. 2), 278 Fed. 895.

We also concede that a person can limit his servants' employment and by proper definite agreement lend them to another for certain purposes. The facts of this case, however, contradict or negative a relationship of master and servant between petitioner and respondent's tug captains. *Sternaman* v. *Metropolitan Life Ins. Co.* (1902), 170 N. Y. 13, 20.

Respondent asserts that, under the pilotage clause, it was beyond the scope of its tug captains' employment to leave their tugs and go aboard a vessel under steam. Petitioner did not ask them to do so, but respondent's own evidence shows that they went on the *Sabine Sun under its instructions.* Any such inference from the pilotage clause is over-

come where, as here, the tug captains were *expressly authorized by respondent* to take charge of the steamer and were *ordered to carry out respondent's instructions* while there. Even if the clause otherwise might validly accomplish its intended purpose, respondent has contradicted its language and displaced it in the case of the *Sabine Sun* towage.

The tug captains went on the steamer's bridge for their own convenience in supervising *respondent's work,* and they were just as much respondent's servants there as on their own tugs. *The Procida* (1917 S. D. N. Y.), 243 Fed. 251. As this court said in *Sturgis* v. *Boyer, supra:*

> "By employing a tug to transport their vessel from one point to another, the owners of the tow do not necessarily constitute the master and crew of the tug their agents in performing the service. They neither appoint the master of the tug, nor ship the crew; nor can they displace either the one or the other. Their contract for the service * * * is * * * made with the owners of the vessel, and the master of the tug * * * continues to be the agent of the owners of his own vessel, and they are responsible for his acts in her navigation." Page 123.

What difference can it make if the tug captain chooses to act from the steamer's bridge? In the *Sturgis* case the tug captain piloted from the tow's quarter-deck (p. 121), but that did not relieve the tower of liability.

While maintaining that *the pilotage clause* was *a part* of the contract, respondent argues that it did not agree to supply *pilotage* as a part of that contract. Of course, Turnbull did not expressly order a pilot when he requested the service, but he expected that someone would take charge for respondent (R. 25, 29-30). *The Edward G. Murray, supra,* page 898. When requesting transportation one does not expect merely a vehicle, but also a person to operate and guide that vehicle.

Whether or not pilotage was contracted for here, a tug captain was furnished and authorized by respondent to pilot.

Fort himself testified that he was authorized and instructed by respondent to "go aboard the ship" (R. 44) and "to take charge of it" (R. 43). He placed the tugs, and gave the orders to them and to the ship (R. 34). George Dalzell, an officer of respondent company, admitted that his company *piloted* steamers for petitioner (R. 50),—a clear recognition that pilotage as well as towage was by respondent, the independent contractor.

Where a shipowner engages an independent contractor to do work, the contractor cannot send his employee to take charge, subject to his orders and control, and escape liability for the employee's negligent acts merely by calling him the shipowner's servant. In *Standard Oil Co.* v. *Anderson, supra,* this Court said at page 221:

> "He who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it, because, though it is done for the ultimate benefit of the other, it is still in its doing his own work."

Sternaman v. *Metropolitan Life Ins. Co., supra,* involved an application for insurance containing an agreement that the medical examiner, selected, employed and paid by the insurer, would be the agent of the insured in examining him. The insured had nothing to do with the examination except to submit and answer questions. It was held (p. 22) that, notwithstanding the agreement contained in the application form, "the relation of principal and agent did not exist between them, either by virtue of any contract or by operation of law," the court saying:

> "As between the examiner and the insured, the relation of principal and agent did not exist, while,

> as between the examiner and the company, that relation did exist by operation of law, yet it is claimed that as between the insured and the company, the examiner was the agent of the former, only, because he had so agreed, not with the examiner, but with the company itself. Under the circumstances, an agreement that the physician was the agent of the insured was like an agreement that the company, or its president, was his agent. It was in contradiction of every act of the parties and of every fact known to either." Page 20.

The pilotage clause at bar is not the determining factor of the relationship between petitioner and respondent's tug captain. That relationship must be determined by the selection, the employment, the control, and the work being done. *Standard Oil Co.* v. *Anderson, supra.* For the relationship to exist there must be a master as well as a servant. *Little* v. *Hackett* (1886), 116 U. S. 366. In *McNamara* v. *Leipzig* (1919), 227 N. Y. 291, 294, the court said:

> "The relation of master and servant is created by contract, express or implied. Of the elements which may constitute it, those that the servant must, in the course of the employment, be doing the work of the master under the will, direction and control of the master throughout all the details of the work, are essential."

One cannot serve two masters with conflicting interests, and "could not at the same time be properly deemed the servant of both parties." *Sturgis* v. *Boyer, supra,* p. 124. When respondent intentionally kept control, and continued the master of these tug captains, it made it impossible for them to become the servants of petitioner, irrespective of any prior pilotage clause.

Fort, under respondent's orders, refused to be petitioner's true servant. Respondent claims petitioner "accepted" him

because Turnbull acquiesced in his coming aboard the steamer and did not refuse to let him take charge. The acceptance of him as the independent contractor's supervisor of the work could not make him petitioner's servant. If the contract had oligated petitioner to accept, as its servant, any tug captain furnished by respondent, surely it would not obligate it to accept one over whom it had no control and who would not be subject to its orders. It could only require petitioner to accept a servant in fact.

There was evidence in this case that respondent's tug captain, Fort, received $15 from petitioner (R. 37), and respondent has claimed that this was a payment for his services to the *Sabine Sun*. This tug captain was on respondent's payroll, and of course he could not recover from petitioner for negligently grounding the steamer while on her in the performance of respondent's work, either on any express contract or on a *quantum meruit*. The fact that a gratuity was asked and paid does not prove either a contract or a relationship. The District Court correctly held, in conformity with the uniform holdings of other courts, that such payment was a mere gratuity (R. 77). *The Edward G. Murray, supra; The Procida, supra; The Caspian* (1925 E. D. Pa.), 14 F. (2d) 1006, aff'd (1926 C. C. A. 3) 14 F. (2d) 1013.

"The master of the tug remained in the employ of the respondent while performing pilot service for the vessel." *The Caspian, supra,* 1009.

FOURTH POINT.

The *Sabine Sun* was damaged by the negligence of respondent's tug captain, for which respondent is liable.

The lower courts did not decide whether the stranding was due to Fort's negligence, but held that because of the pilotage clause respondent would not be liable in any event. If, however, as we contend, Fort remained respondent's servant and there was no valid contract which relieved it of liability for negligence, it becomes necessary to consider respondent's liability on the merits.

This is a trial *de novo* in this Court. *Langnes* v. *Green* (1931), 282 U. S. 531, 536-7; *Watts, Watts & Co.* v. *Unione Austriaca, etc.* (1918), 248 U. S. 9, 21.

Respondent furnished the three tugs, their officers and crews, for a consideration, as capable of taking the *Sabine Sun* to her new berth. The captain of one of the tugs was furnished, and instructed, to take charge of the movement. It was admitted that, while he had complete charge, he guided the steamer into shallow water (R. 36-8, 40), which the evidence showed, and the District Court found, was outside the channel (R. 77). These facts establish a clear *prima facie* case of negligence on the part of respondent and its tugs. In the language of the Circuit Court of Appeals for the Second Circuit, "this case is one where the stranding of a steamer created a presumption of negligence." *The W. G. Mason* (1905), 142 Fed. 913, 914-5.

In *The Lizzie M. Walker* (1925), 3 F. (2d) 921, the Circuit Court of Appeals for the Fourth Circuit said:

> "The unexplained grounding of the steamer * * * is also evidence of the incompetency or negligence of her navigators." Page 922.

Respondent's tug captain was navigating the *Sabine Sun,* and he was either incompetent or negligent in taking her outside the channel where there was not sufficient water. The presumption against the tugs was overcome by Fort's testimony that they obeyed all orders given by him and did everything required of them (R. 46-7), but his consequent admission that it was at his orders that they went out of the channel with the steamer made the presumption against him and his employer stronger. He admitted that the steamer stranded while on a course voluntarily chosen by him (R. 36-8, 40).

Although Fort claimed that he was familiar with these waters (R. 37, 39), and had checked the deep water just before this time (R. 42-3), he did not know whether the *Sabine Sun* struck in or out of the channel (R. 37, 6). The most he would say was that he thought she must have been in the channel because she was on some arbitrary shore ranges which he had adopted (R. 37, 40). Respondent's other tug captain, Bennett, admitted that he was not familiar with the channel and did not know whether she was in or out (R. 49).

Fountain, a disinterested expert familiar with these waters, testified definitely that the *Sabine Sun* was out of the channel where she lay aground (R. 52). Fulton, the Army Engineer on duty there, took sextant angles on the steamer's stem (R. 74), which place her some distance east of the channel when plotted on Respondent's Exhibit K (R. 75). Indeed, respondent never attempted to prove that the stranding occurred in the channel, nor to show where it occurred on the chart used by Fort. On the evidence the District Court could not find other than that it was out of the channel (R. 77).

One who undertakes to transport a vessel is bound to know the channel, and, unless forced out by something be-

yond his control, to keep in it. In *Altee* v. *Packet Co.* (1874), 21 Wall. 389, this Court said:

> "The character of the skill and knowledge required of a pilot in charge of a vessel on the rivers of the country is very different from that which enables a navigator to carry his vessel safely on the ocean. * * * But the pilot of a river steamer, *like the harbor pilot,* is selected for his personal knowledge of the topography through which he steers his vessel. * * * He must know where the navigable channel is, in relation to all these external objects, especially in the night. He must also be familiar with all dangers that are permanently located in the course of the river, as sandbars, snags, sunken rocks or trees, or abandoned vessels or barges. All this he must know and remember and avoid." Page 396. (Italics ours.)

In *White* v. *Upper Hudson Stone Co.* (1917 C. C. A. 2), 248 Fed. 893, Circuit Judge HOUGH, speaking of a tug's duty to her tow, said:

> "She assumed the ordinary obligations of a towing vessel; *inter alia,* to know the recognized channel, the tides, the draft of the tow, and with reasonable skill to judge the weather." Page 895.

See also *Thompson* v. *Winslow* (1904 D. C. Me.), 128 Fed. 73, 82; *The Henry Chapel* (1882 D. C. Mass.), 10 Fed. 777, 778; *Great Lakes Towing Co.* v. *Alva S. S. Co.* (1919 C. C. A. 7), 261 Fed. 261, 262.

Before undertaking this job Fort obtained charts from the Army Engineers and personally located the channel by soundings. He found that there was 26 to 30 feet of water in the channel (R. 43). After taking such preliminary precautions he made no use of them, but, on the contrary, proceeded to navigate by some haphazard shore range, which he admits took him to the point of stranding (R. 37-8, 40).

The precautions taken a day or so before would be commendable if he had not then ignored them and trusted to arbitrary ranges, which were not shown to be either proper or in general use. There was no use in sounding for the channel if he was going to take a course outside where he did not sound (R. 42-3).

He testified that, because of his familiarity with the waters (R. 37), he did not need markings or aids to navigation (R. 39); but he used ranges which proved improper, rather than care in keeping to the established channel. He was furnished by respondent as one skilled in safely guiding vessels up into Newark Bay to Bayonne, and as this Court said in *Steamboat New World* v. *King* (1853), 16 How. 469:

> "It is also settled that if the occupation or employment be one requiring skill, the failure to exert that needful skill, either because it is not possessed, or from inattention, is gross negligence." Page 475.

In *The Margaret, supra,* this Court said that a tug taking a tow into port was not a common carrier nor an insurer, but nevertheless,

> "She was bound to bring to the performance of the duty she assumed reasonable skill and care, and to exercise them in every thing relating to the work until it was accomplished. The want of either in such cases is a gross fault, and the offender is liable to the extent of the full measure of the consequence." Page 497.

The Margaret involved a claim against a tug *in rem,* but the same claim could be made against her owner *in personam,* and here, where there is no claim *in rem,* the quotation applies to respondent, who assumed the duty.

No excuse was made for Fort's maneuver, and the only explanation attempted was his claim that the charts were

unreliable and that the waters were difficult because of dredging, rocks, treacherous tides, and a narrow channel (R. 33). Such general claims do not excuse, and Fort admitted that he knew of these matters before he undertook the maneuver (R. 42). There is not a scintilla of evidence that any of the alleged difficulties contributed to the stranding of the *Sabine Sun*. *Great Lakes Towing Co.* v. *Alva S. S. Co., supra,* page 264.

The channel was in fact about 500 feet wide (R. 55; Exhibit K, R. 75). There was no evidence of any drills or dredges which forced Fort out of it, and the only tow or vessel which passed during the entire period came down the bay about half an hour after the grounding. There was not even a suggestion that tides drove the *Sabine Sun* off the course adopted (R. 37-8), and the only rock which interfered with the navigation was that, outside the channel, on which the vessel stranded. The stranding was not brought about by any error of judgment *in extremis*. Fort made his plans in advance and kept on his intended route. *It was Fort's ranges that took him out of the channel,* not something for which he was not responsible.

In *The Vim* (1930), 40 F. (2d) 638, 640, the District Court in Rhode Island said that an understanding that a tug owner would tow to a new berth without responsibility "cannot exonerate him from the responsibility of a mishap resulting, *not primarily from the conditions over which he had no control,* but from the faulty carrying out the undertaking assumed." Likewise in this case no understanding should relieve respondent of liability for its tug captain's faulty choice of a course which would lead him outside the channel into shallow water.

Fort claimed that his chart was not reliable, but there is no evidence of this other than his bare statement. The chart could not be blamed unless the steamer stranded where it showed over 24 feet of water, and Fort's own soundings

verified the blueprint in showing that there was sufficient water except outside the channel (R. 43). A plotting on Fort's chart from Fulton's sextant angles discloses that the stranding was some distance east of the channel where the nearest sounding shown on the chart is only 19.9 feet, whereas the ship was drawing about 24 feet (R. 18, 74, 75), and Fort claimed that he thought she was drawing 25 feet 6 inches (R. 33). He admitted that the channel was good for 24 feet (R. 45), and he had no right to assume, if he did, that there was enough water where he had not found over 24 feet, and where the chart did not show it.

A stranding calls for an explanation, and exoneration requires proof that it was not due to the negligence of the person in charge. It requires the tower "to justify its conduct and reconcile it with proper towage." *The Primrose* (1930 C. C. A. 2), 42 F. (2d) 827, 828. It is not enough to say that there were dangers or difficulties present, and nothing would excuse his going out of the channel on a course voluntarily chosen by him. Respondent would be liable for Fort's choice of a course out of the charted deep water. One acting as pilot is not required to know the condition outside the channel, because he is not expected to go there; but reasonable care required Fort not to take chances in the unknown waters east of the channel. *The Somers N. Smith, supra,* 571-5. "When this is shown, the charge of negligence is made out without proof of what it was which was struck." *The Caspian, supra,* 1012.

We believe the law was correctly stated by the Circuit Court of Appeals for the Second Circuit in *The Arlington* (1927), 19 F. (2d) 285:

> "It is of course well established that a tug master is not liable for injuries caused by grounding his tow upon an uncharted and unknown rock in the fairway * * * but he has the burden of so showing * * * because *prima facie* he is at fault. Moreover, if he

> voluntarily leaves the channel he does so at his peril, though the rock or shoal be both uncharted and unknown." Page 286.

The fact that Fort thought there were things to interfere with navigation did not overcome the presumption of negligence from stranding outside the channel, when he was keeping on the shore ranges and course he had adopted. If the claimed dangers did, in fact, exist, they created special circumstances which required the exercise of a decree of care commensurate with the difficulties to be encountered. In *Davidson S. S. Co.* v. *U. S.* (1907), 205 U. S. 187, this Court said:

> "Now there is an obligation on all persons to take the care which *under the special circumstances of the case* a reasonable and prudent man would take, and the omission of that care constitutes negligence." Page 193. (Italics ours.)

In *The W. G. Mason, supra,* two tugs grounded a steamer in waters where there was a difficult unmarked channel with two very sharp turns. The channel was narrow, with shoals on either side and varying currents. The tug whose captain was piloting was held responsible for failure to disprove negligence on his part. Circuit Judge WALLACE, speaking for the Circuit Court of Appeals for the Second Circuit, said:

> "The towage service was to be performed in a part of a channel where thorough acquaintance with the conformation and boundaries, effects of the current, and location of the submerged rocks, was of the utmost importance, * * *.
>
> * * * * * * * *
>
> "It suffices that the misfortune occurred without any fault on the part of the tow * * *, and under a state of circumstances in which, if proper care is ex-

ercised in performing a similar service, such misfortune does not ordinarily occur. This was enough to impose upon the tugs the burden of proof to show that they had exercised due care. (Citing cases.)" Pages 914-5.

The only care claimed for Captain Fort was his preliminary precautions (later discarded) to locate the deep water and his use of arbitrary shore ranges. Respondent claims that it was not negligence for Fort to strand the steamer while on these ranges, because they were the "usual ranges." We dispute this claim, and there is no evidence to support it. Without explaining where he got them, Fort described his ranges as "a big gas tank over the street" (R. 34), and "the gas tower and an open street" (R. 38). He said that when he would "get the tank over the street" he would start to turn (R. 38) and then "head up to the west end of the bay," keeping the tank "in line" (R. 34).

The only other evidence in the record of any ranges was of those used by Captain Fountain in taking vessels up there for years without accident (R. 51-2). He testified that he would go "easy by Bergen Point Light until my bow is I judge about half way between Bergen Point Light and Shooters Island, and then I start to make the turn" (R. 54), that "the proper way is to have the gas tank over the house that is on the west side of the street, and then you begin to turn" (R. 60); and having done that he would "straighten her up, get her on ranges; I use a church steeple on Staten Island, and the middle tower of the railroad bridge across Newark Bay, and head her between those two marks and go up" (R. 54-5).

The only similarity in these ranges is that there is a gas tank and a street in both. Fort said he started to turn when he sighted *a gas tank over a street* (R. 38), but Fountain determined when to turn by sighting *a tank over a house*

on the west side of a street (R. 60). After making the turn Fountain used new ranges, heading between a church steeple and the middle tower of a railroad bridge (R. 54-5). He would have been on these latter ranges, but Fort kept on the turning ranges of the gas tank and street, and was on those when the steamer struck (R. 37-8).

Even if the same gas tank and street were used by both men to determine *when to turn out of Kill van Kull,* that does not make them *usual for navigating in Newark Bay.* Fort said his ranges took him to the point of stranding (R. 37-8), but Fountain's ranges would have taken him half way between there and Shooter's Island (R. 55), or over 400 feet to the west of the rock. If Fort did use Fountain's ranges, he certainly used them in a different manner.

There was testimony that some other vessels grounded *in the neighborhood,* but there was no evidence of their size or draft, the weather and tide conditions, whether they were in or out of the channel, nor of any of the circumstances under which they had stranded. None was shown to have struck the rock on which the *Sabine Sun* stranded. The bare evidence of other groundings is clearly immaterial. The *Sabine Sun* stranded out of the channel under ideal navigating conditions (R. 32), and was not interfered with by obstructions or other navigation (R. 37-8). As far as appears, there may have been some good excuse for the other strandings in Kill van Kull and Newark Bay; but, in any event, the negligence of others would not excuse respondent nor overcome the presumption imposed by law against its tug captain in charge.

The stranding of the *Sabine Sun* occurred on a course purposely taken by Fort. Although in court, he did not dispute that he had to call on Captain Fountain to get him off the rock and safely around Bergen Point. Fort's precautions of the day before did not excuse him in view of his disregard of all due caution during the maneuver. Indeed, his reckless disregard of the valuable information he had ob-

tained was negligence in itself. In the absence of any reasonable explanation of, and excuse for, such conduct, he is responsible for the stranding outside the channel; and respondent is liable for his negligence in so doing. *Sturgis* v. *Boyer, supra; The Margaret, supra; The Edward G. Murray, supra; The Procida, supra; The Caspian, supra; Wilmington Ry. Bridge Co.* v. *Franco-Ottoman S. Co., supra; Allaguash* (E. D. N. Y.), 1930 A. M. C. 1981, 1983.

FIFTH POINT.

Turnbull did not assume responsibility for Fort's negligence.

Because this is a trial *de novo,* and the lower courts did not pass upon one of respondent's defenses (R. 6), it would seem proper for us to discuss it briefly. It has to do with an alleged oral assumption of risk by petitioner's assistant marine superintendent, Turnbull. Fort said (R. 35) he told Turnbull that the channel up to Bayonne was risky and Turnbull said, "I will take the risks" and "If we do as good as we did the last time I will be very much pleased." Again he testified of Turnbull, "He said he would depend on my judgment and if I did as good a job then as I did before, he would be satisfied" (R. 43). Bennett confirmed some such statements by Turnbull, but he was "standing too far away to get it all" (R. 48).

Turnbull emphatically denied such a conversation (R. 60, 28).

Regarding this alleged assumption of risk, the District Judge said (R. 77):

> "So far as the conversation, in which Fort says that Turnbull assumed the risks incident to the navigation of the *Sabine Sun,* is concerned, I am of the belief that it should not, granting that it took place, affect the question of liability."

This statement indicates that the Court doubted that such a conversation took place, and we submit that the unusualness of it would create doubt in any mind. Fort did not say that he asked Turnbull to assume the risk or to do anything else; he pictured Turnbull as voluntarily assuming a risk merely because Fort "explained to him the conditions" (R. 35). Is it reasonable to suppose that Turnbull would gratuitously release Fort and respondent from all responsibility for negligent navigation in the difficult and dangerous conditions pictured by Fort? Could he do it without authority from petitioner, to whom respondent owed a legal duty to use reasonable care?

Fort's testimony in this regard will bear a little scrutiny. Although he testified to a gratuitous assumption of risk, his recital of Turnbull's remarks is illuminating and casts considerable doubt on such a broad statement. He said that Turnbull told him he would be satisfied if Fort would *do as well* as on the last job, when one of petitioner's steamers was taken through Kill van Kull, not Newark Bay (R. 41-2), without stranding (R. 44). He did *not do as well* with the *Sabine Sun,* and did not satisfy Turnbull's requirement.

Even if such a statement as Fort claims had been made by Turnbull, it could not be considered as an assumption of the risk of Fort's negligent or wanton acts; it would cover only the dangers that might be encountered in the channel by a competent and careful pilot. In *The Vim, supra,* a tug owner claimed that when engaged to move a barge he advised the barge owner that the place it was to be moved to was not safe, and that it was understood that he would not move it on his own responsibility. The court said:

> "Such an understanding as that claimed by Hayes cannot exonerate him from the responsibility of a mishap resulting, not primarily from the conditions over which he had no control, but from the faulty carrying out of the understanding assumed." Page 640.

In *The Edmund L. Levy, supra,* page 684, the Circuit Court of Appeals for the Second Circuit approved the following language of the District Court in the same case:

> "Because the canal-boat assumed the risk of ice, she did not thereby authorize towing in the same manner as if the ice were absent."

Likewise in this case, if Turnbull assumed the risk of the channel up Newark Bay, he did not assume the risk of Fort's taking the steamer out of the channel into unknown waters.

In considering the contract alleged to have been made by Turnbull, it is helpful to inquire into the consideration for his gratuitous promise. In answer to the District Court's inquiry, Fort testified that "if he (Turnbull) hadn't taken the risk, I would have taken the ship back to anchorage" (R. 36). When asked whether he thought it proper to wait until the vessel was part way, and then refuse to assume responsibility, he testified:

> "A. These are my orders, that is all I know; * * *.
> "Q. And what did you agree to do if he assumed the responsibility? A. I would do my best to take the ship in." (R. 44.)

Of course, Fort had no right to take petitioner's ship back to where Bennett had first taken her in charge, either with or without a promise from Turnbull; and to have done so would have been a breach of respondent's contract to complete the job that had been commenced at Stapleton. Such a promise as Fort claims would have been obtained from Turnbull, if at all, by duress at a time when the *Sabine Sun* was under Fort's control in waters with which her master was not familiar. To allow a tug captain to force such a promise, without any consideration, legal or otherwise, after the flotilla was under way, would be to approve duress and put a premium on respondent's breach of the original towage

contract. This alleged agreement, being unsupported by any consideration, could not constitute a modification of the towage contract.

Respondent argues that Fort's willingness to continue on was sufficient consideration to support the alleged promise of Turnbull. In the lower courts it cited, in support of this argument, cases holding that a tug captain is negligent in not turning back in time if he finds dangerous conditions ahead. We do not question those cases as applied to the facts then before the courts; but they were not cases where the tugs were required to turn back *because of conditions that were known before they set out,* and which would not seriously interfere with the navigation of a skilled navigator. Neither the weather, the tides, nor the channel changed after this towage service was undertaken, and no obstruction appeared to have been added to, or changed in, the channel.

The very fact that Fort continued on shows that he would not have been justified in turning back—unless because of incompetence. Whether it would be advisable to go ahead or to turn back could not depend on Turnbull's assumption of risk.

Fort was under obligation to complete the towage and could not, by threats, transfer his responsibility to petitioner. The unusual agreement claimed would be wholly one-sided. We deny that such an agreement was made, and submit that, if it had been made, it would have been a promise without consideration, and not binding.

All that this testimony indicates is that respondent and Fort did not then think that Fort was petitioner's servant.

Conclusion.

The tug captain in charge of moving petitioner's steamer, under respondent's authority and instructions, was an employee acting in the service of respondent. The steamer was damaged through his voluntary act, due either to incompetence or negligence, for which respondent would be liable. As petitioner did not assume the risk of his navigating out of the channel, and there was no valid contract relieving respondent of liability for negligence or incompetence, the decision below should be reversed and petitioner awarded an interlocutory decree against respondent with a reference to ascertain and compute the damages.

Respectfully submitted,

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